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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 49

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLEETWOOD TRAILER CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 95-105) is reported at 366 F. 2d 126. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 84-95) are reported at 153 NLRB 425.

JURISDICTION

The decree of the court of appeals was entered on September 8, 1966 (R. 106). By order dated Decem-

ber 8, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including Sunday, February 5, 1967 (R. 107). The petition was filed on February 6, 1967, and was granted on April 10, 1967 (R. 108; 386 U.S. 990). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 2. * * *

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by

any other person who is not an employer as herein defined.

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * *

* * * * * *

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

QUESTION PRESENTED

On the day a strike ended and the strikers sought to return to work, the employer announced that no jobs were available because of a reduction in production caused by the strike. Two months later, the employer, which at all times intended to resume full production as quickly as possible, hired six new employees, even though there were qualified strikers available who had continually made known their desire to return to work. The question presented is whether the employer violated Section 8(a)(1) and (3) of the National Labor Relations Act by thus preferring new workers over the returning striking employees.

STATEMENT

A. The Board's Findings of Fact

On August 5, 1964,[1] the Company, a manufacturer of mobile homes, had about 110 employees and was scheduling production at the rate of 20 units per week (R. 86; 39, 50-51, 55-56, 83). On the following day, as a result of a breakdown in collective bargaining negotiations between the Company and the Union,[2] approximately half of the employees struck in support of their contract demands (R. 85; 2, 5, 33, 51, 61). Because the strike had thus reduced its working force, the Company cut back its production schedule to ten

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[1] All dates hereinafter are in 1964.

[2] San Bernardino-Riverside Counties (California) District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (R. 85).

units per week and curtailed its standing orders for raw materials accordingly (R. 86; 34, 38, 39, 51, 52, 54, 83).

By August 18, the Company had hired 21 new employees and some strikers had returned to work, so that its work force then numbered 71 (R. 85; 39, 47, 62, 81-82). On that date, the Union accepted the Company's last contract offer, terminated the strike, and requested reinstatement of the remaining strikers (R. 85; 34, 46-48). Although the Company intended to increase its production and work force to pre-strike levels "as soon as possible," [3] it explained to the Union that the curtailment in production caused by the strike precluded it from hiring any returning strikers "right at that moment" (R. 85-86; 35, 48, 51, 57); it attributed the expected delay in increasing production to the facts that some supply orders cancelled during the strike required 30 days to fill, and that inexperienced employees hired during the strike had to be trained (R. 85-86; 35, 37-38, 48, 51, 57, 62-63). The Company refused to put the employees who had remained on strike on a preferential hiring list, as requested by the Union. The Company asserted that it would consider them for openings on a nondiscriminatory basis if they made applications for employment and kept them current, but emphasized that it would be free to hire from any source. (R. 85; 34, 48.)

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[3] From their experience, Company officials knew that about 110 employees were needed to produce 20 units per week (R. 56). These levels were achieved by about December 13 (R. 86; 53, 83).

On August 20—two days after the strike ended—six strikers applied for reemployment, and on a number of occasions thereafter indicated to the Company their continued interest in returning to work (R. 86; 2, 5, 14, 17, 20, 23-24, 26-27, 29-31, 67, 71, 79). None of the new employees hired during the strike were specific replacements for these strikers (R. 87; 62-63, 81-82). Between October 8 and 16, the Company hired six employees who had not previously worked for it, for jobs which the striker-applicants were qualified to fill (R. 86, 88-89; 9-11, 16-17, 18-19, 21-22, 25-26, 28-29, 43-44, 46, 54-55, 57); none of these jobs was first offered to the striker-applicants (R. 86; 9). The six striker-applicants were reemployed between November 2 and December 14 (R. 86; 5, 8).

B. The Board's Decision and Order

The Board found that, when the six strikers applied for reemployment at the end of the strike in August, they had not been permanently replaced, since no one had been hired to fill their particular jobs. The Board further found that the lack of immediate openings at that time "was a temporary condition which the * * * [Company] knew would change and intended to change" by "return[ing] to full production and to a full crew as soon as practicable." (R. 87.) The Board concluded that, in these circumstances, the strikers were entitled to reinstatement as jobs reopened in October, in preference to new applicants for employment; and that the Company, by treating the strikers as though their employment status had terminated and by failing to reinstate them, had in-

terfered with and discriminated against them because of their strike activity, in violation of Section 8(a) (1) and (3) of the Act (R. 89-90). The Board ordered the Company to cease and desist from the unfair labor practices found and to reimburse the strikers for any loss of earnings attributable to the Company's failure to reinstate them at the time of the October hirings (R. 90, 91-92, 94-95).

C. The Decision of the Court of Appeals

The court of appeals, one judge dissenting, refused to enforce the Board's order. The court held that the right of an economic striker to reinstatement depends on business conditions and consequent job openings prevailing on the very day he first seeks reemployment. It reasoned that, since the curtailed production resulting from the strike rendered the striker-applicants' jobs unavailable on August 20, when they first sought reemployment, they thereby lost their right to reinstatement and to a preference over new employee applicants when jobs opened up in October. (R. 98-101.)

Judge Ely, dissenting, would have enforced the Board's order. In his view, since the Company admittedly intended to return to its pre-strike level of production and work force as soon as possible, the jobs of the striker-applicants could not properly be treated as having been "abolished," so as to terminate the reinstatement rights of the strikers (R. 103-104). The holding of the court, he concluded, unduly enlarged the risks imposed on employees who strike in support

of their economic demands, and "can have no other effect than to intimidate" them in the exercise of that "precious right" (R. 105).

ARGUMENT

The Company Violated Section 8(a)(1) and (3) of the Act by Failing to Reinstate the Strikers in the Jobs That Became Available as the Company Returned to Normal Levels of Production Following a Temporary Cut-Back During the Strike

A. *Introduction and summary*

Sections 7 and 13 of the Act (*supra*, p. 3) guarantee employees the right to strike, and Section 2(3) (*supra*, p. 2) preserves to strikers their status as employees under the Act. Section 8(a)(1) and (3) implements those guarantees by making it an unfair labor practice for an employer to interfere with employees in the exercise of their right to strike, or to discourage their participation in such activity by discrimination in employment. See *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 233. An employer who refuses to reinstate strikers at the conclusion of an economic strike,[4] and instead prefers

[4] It is conceded that the strike here was an economic one, in support of the employees' collective bargaining demands, and not a strike caused by the employer's unfair labor practices. Accordingly, we do not discuss the right of reinstatement in the latter context. We merely note that unfair labor practice strikers are ordinarily entitled to reinstatement even if the employer has hired permanent replacements for them during the strike. See *Mastro Plastics Corporation* v. *National Labor Relations Board*, 350 U.S. 270, 278; *National Labor*

new employee-applicants, necessarily interferes with the right to strike and discriminates against the strikers because of that activity. Therefore, such an employer violates the Act unless he establishes that his conduct was motivated by "legitimate and substantial business justification * * *." *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 87 S. Ct. 1792, 1798. Even when the employer has such a reason, however, a violation of the Act may occur if the adverse effect of his conduct on the employees' right to strike is "inherently destructive" rather than "comparatively slight." *Ibid.* Moreover, it is the primary responsibility of the Board "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *Id.* at 1797; accord, *National Labor Relations Board* v. *Erie Resistor Corp.*, *supra*, 373 U.S. at 228-229, 236.

Thus it is settled that, in the interest of maintaining operations during an economic strike, an employer may hire permanent replacements for the strikers;

Relations Board v. *Remington Rand, Inc.*, 130 F. 2d 919, 927-928 (C.A. 2).

Similarly, the strike was not unlawful in any respect and the strikers did not engage in any misconduct. Accordingly, we do not discuss the question of when such circumstances cause strikers to forfeit their right to reinstatement. See, generally, *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U.S. 31; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240; *W.L. Mead., Inc.*, 113 NLRB 1040. Cf. *National Labor Relations Board* v. *E.A. Laboratories, Inc.*, 188 F. 2d 885 (C.A. 2), certiorari denied, 342 U.S. 871; *National Labor Relations Board* v. *Thayer Co.*, 213 F. 2d 748 (C.A. 1), certiorari denied, 348 U.S. 883.

and he is not obliged to create positions for the strikers, when they seek to return to work, by discharging their replacements. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 346. On the other hand, the employer may not offer super-seniority to replacements for strikers and to strikers who abandon the strike, even though that might be the only means by which he could attract sufficient personnel to maintain production; the giving of super-seniority impairs the right to strike so severely (more so than ordinary replacement) that the employer's business interest does not "outweigh the necessary harm to employee rights." *National Labor Relations Board* v. *Erie Resistor Corp.*, *supra*, 373 U.S. at 230-232, 236-237.

Nor need an employer create new positions for returning strikers whose jobs had been permanently abolished for substantial business reasons during the period of a strike. *Arthur H. Sumner*, 109 NLRB 234. But if job reduction or elimination be of a temporary nature, economic strikers are entitled to reinstatement. *National Labor Relations Board* v. *R. C. Can Co.*, 328 F.2d 974, 981-982 (C.A. 5); *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F.2d 633, 636 (C.A. 2).

The question presented here is whether an employer may properly treat the employment status of unreplaced economic strikers as terminated, and subsequently hire new employees in preference to them, merely because on the day that the strikers first applied for reinstatement their jobs were temporarily

unavailable, the employer having reduced production because of the strike. Applying the principles outlined above, we shall show that such conduct is "inherently destructive" of the right to strike and is supported by no "legitimate and substantial business justifications" (*National Labor Relations Board* v. *Great Dane Trailers, Inc., supra*, 87 S. Ct. at 1798), and therefore that the Board was warranted in concluding that the Company violated Section 8(a)(1) and (3) of the Act, even though there was no showing of anti-union motive. We shall also show that the court below, in refusing to enforce the Board's order, erred in equating temporary job unavailability with job abolition and in finding Board precedents dealing with the latter to be persuasive in this discrete case.

B. *The Company's action was "inherently destructive" of the right to strike, and was not privileged by any overriding business justification*

When the six strikers involved here applied for their jobs at the end of the strike, the Company had not permanently replaced them with other employees.[6] Moreover, while the jobs of the six strikers were not available when they first sought to return to work,

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[6] While 21 new employees had been hired during the strike, the work force was still about 39 employees below its normal complement of 110 (*supra*, pp. 4-5); and the Company made no effort to establish that the 21 new employees replaced any particular strikers (see, *e.g.*, R. 62-63). The burden of proving that a striker has been permanently replaced is on the employer. See *National Labor Relations Board* v. *Plastilite Corp.*, 375 F. 2d 343, 348 (C.A. 8); *M. Eskin & Son*, 135 NLRB 666, 668-669, enforced as modified, 312 F. 2d 108, 114, n. 3 (C.A. 2); *New Orleans Roosevelt Corp.*, 132 NLRB 248, 250.

this condition was merely a byproduct of the strike and was plainly transient. Thus, when the Company curtailed its production schedule during the strike, it reduced standing orders for raw materials accordingly; when these orders were renewed, a month or so was required to fill them. Also, as previously noted (*supra*, n. 5), the Company hired new employees during the strike, who had to be trained. For these reasons alone, the Company explained to the Union at the conclusion of the strike, it was not in a position to increase production or hire any strikers "right at that moment" (*supra*, p. 5). At all times, however, the Company intended to return to the pre-strike levels of production and employment "as soon as possible" (*supra*, p. 5). Indeed, in October, less than two months after the six strikers first sought reemployment, the Company hired six employees in preference to them (*supra*, p. 6).

The court of appeals, adopting the Company's position, held that the job rights of the strikers must be "tested as of the date when [they] applied for work" (R. 100), and, since their jobs were unavailable on that day, the strikers lost their employee status and their right to reinstatement—notwithstanding that the job unavailability was a temporary phenomenon directly attributable to the strike, that the Company intended to, and did, resume pre-strike levels of production and employment as soon as possible, and that the strikers had indicated their continuing desire to return to work by reporting periodically.

The court's view of reinstatement rights would seriously impair the right to strike. The object of any

strike is to exert pressure upon the employer by lessening his ability to carry on operations during the concerted walkout. Hence, if a strike is at all successful, it is likely that the normal level of production and complement of jobs will be curtailed. And, due to the nature of many enterprises, a complete resumption of operations cannot be effected at the moment the strike ends and the strikers apply for reinstatement. If the resulting temporary unavailability of positions permits an employer to deny the striker-applicants reinstatement when he subsequently reopens their jobs, and to prefer instead new employee-applicants, the ineluctable consequence is that employees will be deterred from striking. This would be particularly true in an industry in which a company was able to enjoy flexibility in adjusting its production levels, without, for example, risking permanent loss of customers. As Judge Ely pointed out below in dissent (R. 105), to subject strikers to that risk, "can have no other effect than to intimidate those who believe themselves to be economically aggrieved, especially those who, for long tenure, have earned valuable benefits * * *." Cf. *National Labor Relations Board* v. *Burnup & Sims*, 379 U.S. 21, 23-24. Indeed, the risk of job loss or other impairment of job security incurred by the strikers would increase, anomalously, in proportion to the effectiveness of their concerted action, *i.e.*, the more effective the strike in curtailing the employer's operations, the more jobs there will be temporarily unavailable at the end of the strike.[6]

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[6] Although the Company subsequently offered to, and did reemploy, the six strikers (*supra*, p. 6), it was as new em-

The risk to the strikers, and hence the impairment of their right to strike, is far greater than that involved in the employer's privilege to hire permanent replacements, sanctioned by *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333. Replacement is not an inevitable consequence of striking, nor does the likelihood of replacement increase with the effectiveness of the strike. Rather, whether the employer will be able to find permanent replacements depends upon such largely fortuitous circumstances as the supply of labor available, and the skills needed by him and possessed by potential replacements. Similarly, no new or greater risk is

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ployees. Accordingly, under the decision below, the six strikers would not only lose several months' pay, but any seniority rights which they may have acquired prior to the strike, thereby rendering them vulnerable to discharge in an economic layoff ahead of the new employees the Company had earlier hired. To be sure, the Board stated (R. 90) that "[a]ll [six] of the affected individuals have been rehired and there is no claim that they were not fully reinstated." But that statement was made in discussing the remedy necessary to cure the violations found; the Board was not suggesting that the rehiring of the strikers gave them the full measure of security they had enjoyed before the strike.

It is, of course, settled that a returning striker whose employment status has not been terminated is not only entitled to reemployment ahead of equally qualified new employee-applicants, but also to retain seniority and other employment rights which he earned prior to the strike. See *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 422 (C.A. 2), enforcing, 10 NLRB 1385, 1400-1401, 1403-1404; *National Labor Relations Board* v. *Robinson*, 251 F. 2d 639 (C.A. 6); *Editorial "El Imparcial", Inc.*, 123 NLRB 1585, 1586, 1600, enforced, 278 F. 2d 184, 187 (C.A. 1); *Republic Steel Corp.* v. *National Labor Relations Board*, 114 F. 2d 820 (C.A. 3).

imposed on strikers by denying them reinstatement if their jobs have been permanently eliminated or abolished for economic reasons. See discussion, *infra*, pp. 16-18. The disability of the strikers in that situation is essentially no different from that which any employee may incur, for there is always a risk that changes in economic conditions or in efficiency of production may prompt the elimination of the jobs which some employees hold.

The serious infringement on the employees' "precious rights" to strike (R. 105) that follows from the position of the majority below is not justified by any significant business interest on the part of the Company. Certainly the interest underlying an employer's right to hire permanent replacements—the need for personnel to carry on operations notwithstanding a strike—can not support the Company's hiring of new applicants in preference to strikers after the strike had ended and the strikers have indicated their desire to return to work. Nor can the interest underlying the permanent abolition of certain jobs—the need to adapt to changes in business conditions or to improve efficiency—support the Company's refusal to reinstate the striker-applicants when their jobs reopen after an admittedly temporary curtailment of production designed solely to meet the strike. Of course, the Board in fashioning the remedy took account of the temporary unavailability of jobs at the conclusion of the strike resulting from the curtailment of production during the strike.[7] But the Company's temporary

[7] The Board's backpay remedy runs from the date jobs became available in October to the date the striker-applicants

lower rate of production when the strike ended could not justify its refusal to reinstate the striker-applicants, and its preference for new employee-applicants, when it soon began to return to its pre-strike levels of production and employment in acordance with its consistent intention.[8]

In short, the Company's conduct is inherently destructive of the right to strike and serves no significant business purpose. The Board was thus warranted in finding that the Company violated Sections 8(a)(1) and (3) of the Act even though no anti-union motive was shown. *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, *supra*, 87 S. Ct. at 1798; *National Labor Relations Board* v. *Erie Resistor Corp.*, *supra*, 373 U.S. at 227-229.

C. *The court below erred in concluding that precedents concerning job abolition were controlling in this discrete situation*

To deprive strikers of employment status when their jobs are temporarily unavailable at the end of a strike goes beyond the usual job abolition situation. An employer might, for example, anticipate a reduc-

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were reemployed (R. 90, 91). See *R.C. Can Co.*, 140 NLRB 588, 597; *Cincinnati Steel Castings Co.*, 86 NLRB 592, 595, 623; *Electric Auto-Lite Co.*, 80 NLRB 1601, 1610; *Commodore Watch Case Co.*, 114 NLRB 1590, 1601.

[8] The Board found that the six striker-applicants were qualified for the six jobs which were reopened in October, and would have been reinstated by the Company had it considered them as employees rather than new applicants (R. 89; *supra*, p. 6). There is no evidence in the record as to the qualifications of the new applicants who were hired (R. 88).

tion in business for an indefinite period because of general economic or other business conditions. That retrenchment plan might be put into effect during a strike, with the consequent abolition of some jobs. See, *e.g.*, *Arthur H. Sumner*, 109 NLRB 234. Similarly, during the period of a strike but for substantial business reasons independent of it, an employer might decide that a particular production line was inefficient and should be automated or eliminated. Apart from duty-to-bargain considerations and assuming no anti-union motivation, there would be no unfair labor practice in refusing to reinstate strikers whose jobs thus had been abolished. Cf. *National Labor Relations Board* v. *R. C. Can Co.*, 328 F.2d 974, 981-982 (C.A. 5), enforcing 140 NLRB 588, 597-598. As we have pointed out (*supra*, p. 15), the risk of loss of employment because of changed economic conditions or business operations poses no new and additional threat to employees. However, the Board was, we submit, clearly correct in refusing to treat a temporary reduction in the number of jobs because the employer could not maintain full operations during a strike—a "temporary condition with the [Company] knew would change and intended to change" (R. 87)—as within the job abolition category.

Indeed, the situation where the striker's job is temporarily unavailable due to a reduction in production caused by the strike is not distinguishable in any meaningful sense from one where the striker's job is unavailable because of other temporary measures taken to meet the strike, *e.g.*, a temporary reschedul-

ing of production, or performance of the work by other employees under a makeshift arrangement. It is well settled that, in the latter situations, the striker's right to reinstatement is not lost, as it would be in the case of job abolition. See *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F.2d 633, 636 (C.A. 2); *National Labor Relations Board* v. *R. C. Can Co., supra; National Labor Relations Board* v. *Marydale Products Co.*, 311 F.2d 890, 891-892 (C.A. 5), certiorari denied, 375 U.S. 817; *Tyrrell County Lumber Co.*, 101 NLRB 155, 161; *Commodore Watch Case Co.*, 114 NLRB 1590, 1597-1601; *Philanz Oldsmobile, Inc.*, 137 NLRB 867, 871.

In concluding that temporary job unavailability as a result of reduced production due to the strike was the equivalent of job abolition (see *supra*, p. 12),[9] the court of appeals relied on two decisions of the Board. However, as the dissenting judge demonstrated (R. 104-105), those decisions are inapposite.

In *Atlas Storage Division*, 112 NLRB 1175, 1179-1180, 1195, enforced, *sub nom. Chauffeurs Local 200* v. *National Labor Relations Board*, 233 F.2d 233, 238 (C.A. 7), the Board found that, during the strike,

[9] Contrary to the Company's assertion (Brief in Opposition, pp. 4-7), the conclusion of the court of appeals that "the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated" (R. 101) presents more than a substantial evidence question. The court's conclusion rests on the legally erroneous premise that temporary job unavailability due to a production loss caused by the strike is the equivalent of job abolition; the characterization of the facts for the purpose of determining the applicable legal rules is obviously not a pure substantial evidence question.

the striker's job had been in effect abolished because the employer had permanently lost customers. In *Brown and Root, Inc.*, 132 NLRB 486, 493-494, 521-522, the Board found that the strikers had been permanently replaced during the strike. Under these circumstances, the Board held that the strikers' employment status had been properly terminated prior to their requests for reinstatement, and thus that the employer was not required to seek them out when vacancies arose thereafter. Here, however, the Company neither permanently replaced the strikers nor underwent permanent changes in its operation which eliminated the jobs of the striker-applicants. Instead, it temporarily curtailed production solely because of the strike, fully intending at all times to return to pre-strike production and employment levels as soon as possible. Similarly, the jobs for which the six new workers were hired in October were not "vacancies" arising after the striker-applicants' initial request for reinstatement in August—*i.e.*, jobs which had been filled by other employees at that time (see *Atlas Storage, supra*, 112 NLRB at 1180, n. 15).[10] Rather they

[10] The Company urges (Brief in Opposition, p. 7) that, since it had 71 employees at the conclusion of the strike and only 68 before hiring commenced in October, it necessarily follows that three of the jobs for which new employees were hired in October had been previously held by replacements hired during the strike. This argument lacks merit. As noted (n. 5, *supra*), the employer, the party who has access to the necessary information, has the burden of proving for which jobs he has hired replacements. Here the Company offered no evidence to show that, during the strike, replacements had been hired for any of the particular jobs for which new employees were hired in October. Indeed, since the Company

were jobs which had been temporarily closed due to the production cutback and were being reopened in accordance with the Company's intention to resume full production. Finally, the Company was not required to seek out the striker-applicants since they had continually made known their availability and desire to return to work.[11]

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had about 110 employees prior to the strike and only 71 at its conclusion, it is more likely that all six jobs which were reopened in October were among the 35 or 40 jobs left temporarily unfilled at the conclusion of the strike due to the production curtailment.

[11] The Company contended below that the Union had agreed to a nonpreferential hiring list and thereby had waived any right the striker-applicants may have had to reinstatement ahead of new employee-applicants. The court of appeals did not reach the issue (R. 101). The record, however, amply supports the Board's findings (R. 86) that the Union merely "had bowed to the [Company's] decision" to adopt a nonpreferential hiring plan, *i.e.*, under the circumstances, the Union's submission could not be viewed as an effective waiver of the strikers' reinstatement rights. Plainly there was no real agreement between the parties. The Company simply insisted on a nonpreferential plan (R. 34, 48), and the Union, admittedly "rather unhappy" about the Company's position (R. 48), could not do anything about it. When the issue of reinstatement arose, the Union already had lost the strike and had been forced to accept the Company's pre-strike contract offer (R. 47-48). The Union received nothing in return for the nonpreferential plan; it was not even reduced to writing. Moreover, even if the Union had agreed to a nonpreferential plan, this would not have constituted an effective waiver of the employees' statutory right to reinstatement. *Electrical Workers Local 613* v. *National Labor Relations Board*, 328 F. 2d 723, 726-727 (C.A. 3); *National Labor Relations Board* v. *E.A. Laboratories, Inc.*, 188 F. 2d 885, 887 (C.A. 2), certiorari denied, 342 U.S. 871; *Laclede Metal*

Accordingly, neither *Atlas Storage* nor *Brown and Root* justifies the result reached by the court of appeals in this case. The situation here is more analogous to the cases of temporary readjustment, cited *supra*, pp. 17-18, which make clear that temporary conditions do not impair the reinstatement rights of strikers.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to enter a decree enforcing the Board's order.

Respectfully submitted.

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Products Co., 144 NLRB 15, 16; *Wooster Div. of Borg-Warner Corp.*, 121 NLRB 1492, 1495; *Universal Food Service, Inc.*, 104 NLRB 1, 15-16; *Old Towne Shoe Co.*, 91 NLRB 240, 243, n. 11.

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